Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CAVALIER MANUFACTURING, INC.
D/B/A BUCCANEER HOMES OF ALABAMA, INC.,

Petitioner,

v.

ANGELA JACKSON AND SHAWYN JACKSON,

Respondents,

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

ROBERT W. BRADFORD, JR.
(Counsel of Record)
JOHN R. BRADWELL
HILL, HILL, CARTER, FRANCO,
COLE & BLACK, P.C.
425 SOUTH PERRY STREET
P.O. BOX 116
MONTGOMERY, AL 36101-0116
(334)834-7600

ATTORNEYS FOR PETITIONER
CAVALIER MANUFACTURING, INC. D/B/A
BUCCANEER HOMES OF ALABAMA, INC.

53pp.

QUESTION PRESENTED

Whether the Supreme Court of Alabama erred and violated the rights of Petitioner Cavalier Manufacturing, Inc. under the Federal Arbitration Act when, after holding that an arbitration agreement substantially affected interstate commerce and was valid and enforceable under the Federal Arbitration Act, the Supreme Court of Alabama then held that a portion of the arbitration agreement which stated that the arbitrator would have no power to award punitive damages was void because it was contrary to the public policy of the State of Alabama?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Pursuant to Rule 29.6 of the Supreme Court Rules and to enable the Justices to evaluate possible disqualification or recusal, Cavalier Manufacturing, Inc. certifies that its parent corporation, Cavalier Homes, Inc., has issued shares to the public and owns 10% or more of the stock of Cavalier Manufacturing, Inc.

TABLE OF CONTENTS

Page

I. QUESTION PRESENTED i

II. CORPORATE DISCLOSURE STATEMENT ii

III. TABLE OF AUTHORITIES iv

IV. CITATION OF OFFICIAL AND UNOFFICIAL REPORT OF OPINION OF THE SUPREME COURT OF ALABAMA v

V. STATEMENT OF BASIS FOR JURISDICTION vi

VI. STATUTES INVOLVED IN THIS CASE viii

VII. STATEMENT OF THE CASE 1

VIII. STATEMENT OF FACTS 4

IX. ARGUMENT 6

X. CONCLUSION 14

TABLE OF AUTHORITIES

CASES PAGE

Allied-Bruce Terminix Companies, Inc. v. Dobson,
513 U.S. 265 (1995).....8

Baravati v. Josephthal, Lyon & Ross, Inc.,
28 F.3d 704 (7th Cir. 1994) 7, 10-12

Bonar v. Dean Witter Reynolds, Inc.,
835 F.2d 1378 (11th Cir. 1988) 7, 10, 12

Davis v. Prudential Securities, Inc.,
59 F.3d 1186 (11th Cir. 1995) 7, 10, 12

Dean Witter Reynolds, Inc. v. Byrd,
470 U.S. 213 (1985).....8

Glass v. Kidder Peabody & Co., Inc.,
114 F.3d 446 (4th Cir. 1997) 7, 10-11

Mastrobuono v. Shearson Lehman Hutton, Inc.,
514 U.S. 52 (1995) 6, 8-9

PrimeCo Personal Communications v. Commonwealth Distributors, Inc.,
740 So.2d 585 (Fla. Ct. App. 1999).....7, 10,12-13

Raytheon Co. v. Automated Business Systems, Inc.,
882 F.2d 6 (1st Cir. 1989) 7, 10, 12

Willoughby Roofing & Supply Co. v. Kajima Int'l, Inc.,
598 F. Supp. 353 (N.D. Ala. 1984) 7, 10, 12

STATUTES

9 U.S.C. §2, ***et. seq.*** 8

CITATION OF OFFICIAL AND UNOFFICIAL REPORT OF OPINION OF THE SUPREME COURT OF ALABAMA

Cavalier Manufacturing, Inc. d/b/a Buccaneer Homes of Alabama, Inc. v. Angela Jackson and Shawyn Jackson, Case No. 1000391, __ So. 2d __ , 2001 WL 1177028 (Ala. Oct. 5, 2001).

(Appendix A).

STATEMENT OF BASIS FOR JURISDICTION

On October 5, 2001, having correctly held previously that the arbitration agreement at issue was enforceable under the Federal Arbitration Act, the Supreme Court of Alabama erroneously held that a provision in the arbitration agreement prohibiting the arbitrator from awarding punitive damages was void because it violated the public policy of the State of Alabama. Cavalier requests that this Court grant this Petition for Writ of Certiorari because that holding violates Cavalier's rights under the Federal Arbitration Act and is contrary to decisions of this Court and of United States Courts of Appeal.

Pursuant to 28 U.S.C. §1257, final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by certiorari where any right and/or privilege is claimed under a statute of the United States. Rule 10(c) of the Supreme Court Rules provides for review on a writ of certiorari when a state court of last resort has decided an important federal question in a way that conflicts with recent decisions of this Court. Rule 10(b) of the Supreme Court Rules provides for review on a writ of certiorari when a state court of last resort has decided an important federal question in a way that conflicts with a decision of a United States Court of Appeals.

Cavalier submits that the Federal Arbitration Act requires that arbitration agreements are to be enforced according to the expressed intent of the parties. ***See Mastrobuono v. Shearson Lehman Hutton, Inc.***, 514 U.S. 52 (1995). In this case, the parties expressed their intent that the arbitrator would be prohibited from awarding punitive damages. Had the Supreme Court of Alabama ruled in conformity with the Federal Arbitration Act and this Court's holding in ***Mastrobuono***, it would have enforced the arbitration agreement as written. The Supreme Court of Alabama erred and violated Cavalier's right to arbitration under the Federal Arbitration Act when it held the provision prohibiting the award of punitive damages was unenforceable because it violated the public policy of the State of Alabama. The decision of the Supreme Court of Alabama conflicts with this Court's

decision in ***Mastrobuono***, and also conflicts with the opinion of the United States Court of Appeals for the First Circuit in ***Raytheon Co. v. Automated Business Systems, Inc.***, 882 F.2d 6, 12 (1st Cir. 1989), the opinion of the United States Court of Appeals for the Fourth Circuit in ***Glass v. Kidder Peabody & Co., Inc.***, 114 F.3d 446, 449 (4th Cir. 1997), the opinion of the United States Court of Appeals for the Seventh Circuit in ***Baravati v. Josephthal, Lyons & Ross, Inc.***, 28 F.3d 704, 709 (7th Cir. 1994), and the opinions of the United States Court of Appeals for the Eleventh Circuit in ***Davis v. Prudential Securities, Inc.*** 59 F.3d 1186, 1192 n.6 (11th Cir. 1995) and in ***Bonar v. Dean Witter Reynolds, Inc.***, 835 F.2d 1378, 1387 n. 16 (11th Cir. 1988). In the above cases, the courts held that under the Federal Arbitration Act parties to an arbitration agreement are free to contractually agree that an arbitrator may not award punitive damages.

STATUTES INVOLVED IN THIS CASE

"A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

9 U.S.C. §2.

STATEMENT OF THE CASE

On or about June 9, 2000, Plaintiffs/Respondents Angela Jackson and Shawyn Jackson filed a Complaint against Petitioner Cavalier Manufacturing, Inc., Buccaneer Homes of Alabama, Inc. (Buccaneer Homes of Alabama, Inc. is a division of Cavalier Manufacturing, Inc. and hereafter the two will be referred to jointly as "Cavalier"), and Home Liquidation Company d/b/a C & J Manufactured Homes, Inc. The allegations of the Complaint arose from the sale of a home manufactured by Cavalier to the Plaintiffs by C & J Manufactured Homes, Inc.

On July 19, 2000, Cavalier timely filed a Motion to Dismiss Or, in the Alternative, Motion to Enforce Binding Arbitration And Stay Proceedings asking the trial court to order the Plaintiffs to submit to binding arbitration and to stay the action pending binding arbitration. The motion was made pursuant to the Federal Arbitration Act, 9 U.S.C. § 2, and this Court's holding in ***Allied-Bruce Terminix Companies, Inc. v. Dobson,*** 513 U.S. 265 (1995), and states:

> COME NOW Defendants Cavalier Manufacturing, Inc. and Buccaneer Homes of Alabama, Inc. (a division of Cavalier Manufacturing, Inc.), and , pursuant to 9 U.S.C. § 2 and ***Allied-Bruce Terminix Companies, Inc. v. Dobson***, move that this Court order the Plaintiffs to submit to binding arbitration and stay the trial of this action until arbitration has been had subject to the rules of the American Arbitration Association.

(Appendix C). Also on July 19, 2000, Cavalier filed an Answer in which Buccaneer Homes affirmatively pled the Complaint was due to be dismissed or the action stayed pending binding arbitration.

The trial court denied the motion of Cavalier to dismiss the case or enforce binding arbitration on September 11, 2000. On October 5, 2000, Buccaneer Homes timely filed a Motion to Alter, Amend, Or Vacate Order Denying Motion to Dismiss Or,

in the Alternative, Motion to Enforce Binding Arbitration and Stay Proceedings and a Brief in Support of the Motion to Alter, Amend, Or Vacate. On October 11, 2000, the trial court denied the Motion to Alter, Amend, Or Vacate Order. On November 21, 2000, Cavalier timely filed a Notice of Appeal of the trial court's order of September 11, 2000 denying the Motion to Dismiss Or, In the Alternative, Motion to Enforce Binding Arbitration and Stay Proceedings and of the order of October 11, 2000 denying the motion to alter, amend, or vacate that order.

On April 13, 2001, the Supreme Court of Alabama entered an opinion in this case holding that the arbitration agreement was a contract substantially affecting interstate commerce and was enforceable under the Federal Arbitration Act. In that opinion, the Supreme Court of Alabama remanded the case "with instructions for the trial court to determine whether the arbitration clause is valid even though it prohibits the arbitrator from awarding punitive damages." (Appendix B, p. 8).

On or about May 22, 2001, the trial court entered an order containing no factual findings. In that order, the trial court found that the arbitration clause was not valid and enforceable because it prohibited the arbitrator from awarding punitive damages.

On October 5, 2001, the Supreme Court of Alabama issued a second opinion in this case holding that a provision of the arbitration agreement which prohibited the arbitrator from awarding punitive damages was not valid. Rather than apply federal law pursuant to the Federal Arbitration Act, the Supreme Court of Alabama applied the public policy of the State of Alabama and held the restriction on the arbitrator's ability to award punitive damages violated the public policy of the State of Alabama. The Supreme Court of Alabama held:

> Because the United States Supreme Court has not addressed this issue, and we can find no clear direction on this issue from federal law or federal policy, we conclude that Alabama law and public policy is not

preempted. Therefore, we must determine whether an arbitration clause that forbids the arbitrator from awarding punitive damages is valid in a state that disfavors predispute arbitration clauses.

* * * *

We hold that a predispute arbitration clause that forbids an arbitrator from awarding punitive damages is void as contrary to the public policy of this State - - to protect its citizens in certain legislatively prescribed actions from wrongful behavior and to punish the wrongdoer. If parties to an arbitration agreement waive an arbitrator's ability to award punitive damages, the door will open wide to rampant fraudulent conduct with few, if any, legal repercussions. The Legislature intended that punitive damages be available as a remedy in fraud actions, as evidenced by the enactment of § 6-11-20(a) . The Legislature is endowed with the exclusive domain to formulate public policy in Alabama, a domain upon which the judiciary shall not trod. American Bankers Ins. Co. of Florida, 757 So.2d at 1137. Thus, we conclude that it is not within the province of parties to a predispute arbitration agreement to waive a punitive-damages award.

(Appendix A, pp. 6-8).

STATEMENT OF THE FACTS

On or about April 28, 1998, Plaintiffs purchased a home manufactured by Cavalier from C & J Manufactured Homes. On the date of the sale, Plaintiffs signed an Acknowledgment and Agreement between Cavalier, C & J Manufactured Homes, and Plaintiffs. The Acknowledgment and Agreement provides that all disputes between the parties shall be resolved by binding arbitration. The Acknowledgment and Agreement states, in pertinent part:

> ACKNOWLEDGMENT AND AGREEMENT made as of the 28th day of April, 1998 by the undersigned purchaser(s) (the "PURCHASER") of that certain manufactured home, model 5354, serial number ALBUS3W12971294AB (the "Manufactured Home"), and Buccaneer Homes, a division of Cavalier Manufacturing, Inc. (the "MANUFACTURER") and C & J Manufactured Homes (the "RETAILER").
>
> * * * *
>
> 10. **ARBITRATION** All parties hereto acknowledge and agree that this Agreement and the performance of the transactions contemplated hereby evidence transactions which involve a substantial nexus with interstate commerce. Accordingly, any dispute, controversy or claim of any kind or nature which has arisen or may arise between the parties, their successors, assigns, heirs, representatives, parent companies, divisions, subsidiaries, affiliates, officers, directors, employees, agents, and contractors (including any dispute, controversy or claim relating to the validity of this arbitration clause), whether arising out of past, present or future dealings between the parties, their successors, assigns, heirs, representatives, parent companies, divisions, subsidiaries, affiliates, officers, directors, employees, agents and contractors shall be governed by the Federal Arbitration Act and shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American

> Arbitration Association, and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof . . . .Without limiting the generality of the foregoing, it is the intention of the parties to resolve by binding arbitration, provided herein, all past, present and future disputes, whether in tort, contract, or otherwise, concerning or related to (i) the manufactured home, its sale, warranty, set-up, repair, installation, manufacture, financing, insurance, its condition , (ii) the validity of this agreement, and (iii) any other dealings, business, or otherwise, between the parties, their successors, assigns, heirs, representatives, parent companies, divisions, subsidiaries, affiliates, officers, directors, employees, agents, and contractors. The parties understand and agree that the arbitrator shall have all powers provided by law, and may award any legal or equitable relief, including, without limitation, money damages, declaratory relief and injunctive relief; provided, however, that the arbitrator shall have no power to award punitive damages or other damages not measured by the prevailing party's actual damages.

(Clerk's Record 40). Plaintiffs specifically initialed just above the above paragraph indicating they read and understood the paragraph. (Clerk's Record 40).

The Acknowledgment and Agreement is signed by Plaintiffs Angela Jackson and Shawyn Jackson. The Acknowledgment and Agreement is also signed by a representative of Cavalier and a representative of C & J Manufactured Homes. (Clerk's Record 40).

Cavalier is a Delaware corporation which manufactures manufactured homes in Alabama. The home purchased by the Plaintiffs was manufactured with component parts that had been shipped to Alabama in interstate commerce. The home contained appliances that were supplied by Cavalier and that were shipped to Alabama in interstate commerce. (Clerk's Record 38).

ARGUMENT

Petitioner Cavalier Manufacturing, Inc. d/b/a Buccaneer Homes of Alabama, Inc. ("Cavalier") respectfully requests that this Court grant this Petition for Writ of Certiorari pursuant to 28 U.S.C. §1257 and Rule 10(b) and Rule 10(c) of the Rules of the Supreme Court of the United States. The opinion of the Supreme Court of Alabama decides an important federal question and conflicts with a recent decision of this Court and also conflicts with decisions of the United States Courts of Appeals for the First, Fourth, Seventh, and Eleventh Circuits, a decision from the United States District Court for the Middle District of Alabama, and a decision by the Court of Civil Appeals of Florida.

Cavalier moved to compel binding arbitration pursuant to the Federal Arbitration Act. The Supreme Court of Alabama held that the arbitration agreement was enforceable under the Federal Arbitration Act, but held that federal law and the Federal Arbitration Act do not preempt Alabama law and Alabama public policy on the issue of whether the arbitrator may by agreement be prohibited from awarding punitive damages. The Supreme Court of Alabama held that the provision in the arbitration agreement which restricted the arbitrator's ability to award punitive damages was unenforceable because it conflicted with the public policy of the State of Alabama.

The opinion of the Supreme Court of Alabama holding that the provision in the arbitration agreement that prohibits the award of punitive damages by the arbitrator is unenforceable directly conflicts with the decision of this Court in ***Mastrobuono v. Shearson Lehman Hutton, Inc.***, 514 U.S. 52 (1995). In that case, this Court held that the Federal Arbitration Act requires that private agreements to arbitrate be enforced according to their terms. This Court held that the arbitrability of a punitive damage claim is dependent upon "what the contract has to say." ***Id.*** at 58.

The holding by the Supreme Court of Alabama also conflicts with decisions from the United States Courts of Appeals for the

First Circuit, ***Raytheon Co. v. Automated Business Systems, Inc.***, 882 F.2d 6, 12 (1st Cir. 1989); the Fourth Circuit, ***Glass v. Kidder Peabody & Co., Inc.***, 114 F.3d 446, 449 (4th Cir. 1997); the Seventh Circuit, ***Baravati v. Josephthal, Lyon & Ross, Inc.***, 28 F.3d 704, 709 (7th Cir. 1994); the Eleventh Circuit, ***Davis v. Prudential Securities, Inc.*** 59 F.3d 1186, 1192 n.6 (11th Cir. 1995) and ***Bonar v. Dean Witter Reynolds, Inc.***, 835 F.2d 1378, 1387 n. 16 (11th Cir. 1988); the United States District Court for the Northern District of Alabama, ***Willoughby Roofing & Supply Co. v. Kajima Int'l, Inc.***, 598 F.Supp. 353, 365 (N.D. Ala. 1984); and the Florida Court of Appeals, ***PrimeCo Personal Communications v. Commonwealth Distributors, Inc.,*** 740 So.2d 585, 587 (Fla. Ct. App. 1999). Those courts held that arbitration agreements are to be enforced according to the expressed intention of the parties and that arbitration agreements which restrict the arbitrator's ability to award punitive damages are valid and enforceable.

The issue involved in this case involves an important issue of federal law: whether under the Federal Arbitration Act the parties to a predispute arbitration agreement that substantially affects interstate commerce may agree that the arbitrator may not award punitive damages. However, the Supreme Court of Alabama did not resolve the issue based on federal law, but held that a provision providing that the arbitrator may not award punitive damages is void based upon the public policy of the State of Alabama. The Supreme Court of Alabama held: "Because the United States Supreme Court has not addressed this issue, and we can find no clear direction on this issue from federal law or federal policy, we conclude that Alabama law and public policy is not preempted." (Appendix A, p. 6).

The Supreme Court of Alabama held correctly that the arbitration agreement at issue in this case evidenced a transaction involving a substantial nexus with interstate commerce and was enforceable under the Federal Arbitration Act. Therefore, when deciding whether the restriction on the arbitrator's ability to award punitive damages was enforceable, the Supreme Court of

Alabama erred when it restricted its analysis to the public policy of the State of Alabama instead of determining whether the agreement was enforceable under the Federal Arbitration Act.

The purpose of the Federal Arbitration Act is "to ensure judicial enforcement of privately made agreements to arbitrate." ***Dean Witter Reynolds Inc. v. Byrd***, 470 U.S. 213 (1985).

The Federal Arbitration Act, 9. U.S.C. § 2, ***et seq.*** (hereinafter "FAA"), provides that a "written provision in . . . a contract evidencing a transaction involving [interstate] commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or . . . an agreement in writing to submit to arbitration an existing controversy arising out of such a contract . . . shall be valid, irrevocable, and enforceable. . . ." 9 U.S.C. § 2. This Court has ruled in a case arising in Alabama that an agreement which contains a provision requiring arbitration of the disputes between parties which involves or affects interstate commerce is specifically enforceable under the FAA. ***Allied-Bruce Terminix Cos. v. Dobson***, 513 U.S. 265 (1995).

In the ***Terminix*** decision, this Court categorically rejected the standard previously adopted by the Alabama Supreme Court requiring proof that the parties contemplated substantial interstate commerce to determine whether the FAA applies. Instead, the test set forth by this Court is whether the transaction ***involved or affected*** interstate commerce, regardless of whether the parties contemplated such interstate involvement.

Cavalier introduced evidence to satisfy the threshold question under ***Terminix***. The Supreme Court of Alabama specifically held that Cavalier had proven a substantial nexus with interstate commerce and that the agreement was enforceable under the FAA. However, the Supreme Court of Alabama erroneously held that the provision in the arbitration agreement restricting the arbitrator's ability to award punitive damages is not enforceable under Alabama law.

The ruling of the Supreme Court of Alabama is in error and in conflict with the decision of this Court in ***Mastrobuono v. Shearson Lehman Hutton, Inc.***, 514 U.S. 52 (1995). In

Mastrobuono, this Court held that courts are bound to interpret a contract, including arbitration provisions, "in accordance with the expressed intentions of the parties." Therefore, if the parties agree that punitive damages may not be awarded in arbitration, that provision must be enforced by the court.

The issue in ***Mastrobuono*** also involved the issue of punitive damages but in a slightly different context than in the present case. Under New York state law, an arbitrator could not award punitive damages; however, the arbitration agreement stated that the arbitration agreement would be governed by the Rules of the National Association of Security Dealers, which allowed punitive damages to be awarded. This Court held that based upon the terms of the agreement the arbitrator could award punitive damages because the central purpose of the Federal Arbitration Act is to ensure "that private agreements to arbitrate are enforced according to the terms." ***Id.*** at 53-54. This Court did ***not*** hold that the parties could not agree that punitive damages would not be awarded in arbitration, instead this Court held: "Thus, the case before use comes down to what the contract has to say about the arbitrability of petitioner's claim for punitive damages." ***Id.*** at 58.

In this case, the issue also should come down to what the contract has to say about the arbitrability of Plaintiffs' claim for punitive damages. The agreement expressly states: "that the arbitrator will have no power to award punitive damages or other damages not measured by the prevailing party's actual damages." Pursuant to the decision of this Court in ***Mastrobuono***, that provision does not render the arbitration agreement void. Rather, the provision must be enforced pursuant to the express intention of the parties. The opinion of the Supreme Court of Alabama ruling that the arbitration clause is not valid or enforceable because it prohibits the arbitrator from awarding punitive damages is in error and due to be reversed.

The opinion of the Supreme Court of Alabama is also in direct conflict with holdings of the United States Courts of Appeals for the First Circuit, the Fourth Circuit, the Seventh

Circuit, the Eleventh Circuit, and in direct conflict with the holdings of the United States District Court for the Northern District of Alabama and the Florida Court of Appeals. ***See Raytheon Co. v. Automated Business Systems, Inc.***, 882 F.2d 6, 12 (1st Cir. 1989) ("Parties that do wish arbitration provisions to exclude punitive damages claims are free to draft agreements that do so explicitly."); ***Glass v. Kidder Peabody & Co., Inc.***, 114 F.3d 446, 449 (4th Cir. 1997) (citing ***Mastrobuono*** for the holding "if the contract says 'no punitive damages' that is the end of the matter, for courts are bound to interpret contracts in accordance with the express intentions of the parties, . . ."); ***Baravati v. Josephthal, Lyon & Ross, Inc.***, 28 F.3d 704, 709 (7th Cir. 1994) (holding that parties may stipulate to whatever procedures they want "and surely can stipulate that punitive damages will not be awarded."); ***Davis v. Prudential Securities, Inc.*** 59 F.3d 1186, 1192 n.6 (11th Cir. 1995); ***Bonar v. Dean Witter Reynolds, Inc.***, 835 F.2d 1378, 1387 n. 16 (11th Cir. 1988); ***Willoughby Roofing & Supply Co. v. Kajima Int'l, Inc.***, 598 F.Supp. 353, 365 (N.D. Ala. 1984); ***PrimeCo Personal Communications v Commonwealth Distributors, Inc.***, 740 So.2d 585, 587 (Fla.Ct.App. 1999).

In ***Glass v. Kidder Peabody & Co., Inc.***, 114 F.3d 446 (4th Cir. 1997), one of the issues before the United States Court of Appeals for the Fourth Court was whether the parties' agreement that the issue of punitive damages could be decided by the arbitrator was enforceable. The Fourth Circuit Court held such an agreement was enforceable explaining:

> The issue of punitive damages in an arbitration case is governed by ***Mastrobuono v. Shearson Lehman Hutton, Inc.***, 514 U.S. 52, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995). Here the Supreme Court declared: 'If the contract says 'no punitive damages,' that is the end of the matter, for courts are bound to interpret contracts in accordance with the expressed intentions of the parties - - even if the effect of those intentions is to limit arbitration . . . . On the other hand, we think our decisions in ***Allied-Bruce***

> *[Terminix Cos. v. Dobson*, 513 U.S. 265, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995)], ***Southland***, and ***Perry***, make clear that if contracting parties agree to ***include*** claims for punitive damages within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law should otherwise exclude such claims from arbitration.' ***Id.*** at 56-58, 115 S.Ct. at 1216.

Id. at 448. (emphasis supplied by Court).

In ***Baravati v. Josephthal, Lyon & Ross, Inc.***, 28 F.3d 704 (7th Cir. 1994), one of the issues before the United States Court of Appeals for the Seventh Circuit was whether the arbitrators had exceeded their powers in awarding punitive damages. In discussing the power of an arbitrator to award punitive damages, the Seventh Circuit explained that parties can agree between them as to the procedures that will govern arbitration proceedings between them and can stipulate that punitive damages will not be awarded. The Seventh Circuit held:

> The rules of the American Arbitration Association, which were applicable in those cases, authorize arbitrators to award 'any remedy which [is] just and equitable and within the scope of the agreement,' and this was deemed authorization enough for the awarding of punitive damages. These courts, however, would enforce a provision in an arbitration clause that ***forbade*** the arbitrator to award punitive damages; and if, as we thought was the situation in Mastrobuono, the parties do the same thing by invoking a body of law that contains such a prohibition, there would be no greater reason to refuse to honor their choice. Indeed, short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract. Cf. Rashid v. Schenck Construction Co., 190 W. Va. 363, 438 S.E.2d 543, 547 (1993); Perini Corp. v. Greate Bay

> Hotel & Casino, Inc., 129 N.J. 479, 610 A.2d 364, 369 (1992), overruled on other grounds in Tretina Printing, Inc. v. Fitzpatrick & Associates, Inc. 135 N.J. 349, 640 A.2d 788 (1994); Astoria Medical Group v. Health Ins. Plan, 11 N.Y.2d 128, 227 N.Y.S.2d 401, 403, 182 N.E.2d 85, 87 (1962). For that matter, parties to adjudication have considerable power to vary the normal procedures, DDI Seamless Cylinder Int'l, Inc. v. General Fire Extinguisher Corp. 14 F.3d 1163 (7th Cir. 1994), and surely can stipulate that punitive damages will not be awarded.

Id. at 709. (emphasis supplied by Court).

Cases from the United States Court of Appeals for the Eleventh Circuit agree that parties to an arbitration agreement may agree that the arbitrator may not award punitive damages. ***Davis v. Prudential Securities, Inc.***, 59 F. 3d 1186, 1192 n. 6 (11th Cir. 1995) ("Presumably, therefore, even after the Supreme Court's decision in ***Mastrobuono***, parties wishing to avoid the imposition of punitive damages in arbitration may simply expressly exclude punitive damages in the arbitration agreement."). ***Bonar v. Dean Witter Reynolds, Inc.***, 835 F. 2d 1378 (11th Cir. 1988) (holding that "a clear provision in a contract prohibiting arbitrators from awarding punitive damages" would be enforceable. *Id.* at 1387 n. 16). ***See also Willoughby Roofing & Supply Co. v. Kajima Int'l, Inc.***, 598 F. Supp. 353, 365 (N. D. Ala. 1984) ("If parties to an arbitration agreement desire to exclude the issue of punitive damages from the consideration of an arbitrator and reserve it for judicial hearing, they are free to specify that in their contract."), aff'd, 776 F.2d 269 (11th Cir. 1985).

In ***Raytheon Co. v. Automated Business Systems, Inc.***, 882 F.2d 6 (1st Cir. 1989), the United States Court of Appeals for the First Circuit held: "Parties that do wish arbitration provisions to exclude punitive damages claims are free to draft agreements that do so explicitly." *Id.* at 12.

In ***PrimeCo Personal Communications v. Commonwealth Distributors, Inc.***, 740 So.2d 585 (Fla. Ct. App. 1999), the

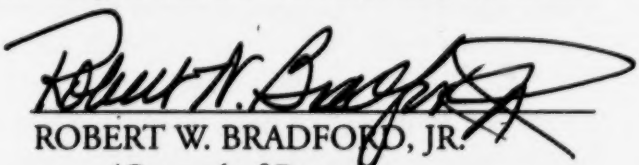
Florida Court of Appeals held that an arbitration agreement could preclude the award of punitive damages. That court explained:

> The contract between PrimeCo and CDI is clear and unambiguous to the extent that it provides for arbitration of '***any*** claim, controversy or dispute between the parties.' [Citations omitted]. Additionally, the contract provides that the arbitrator's authority to award damages is limited to compensatory damages. It is, therefore, abundantly clear that the parties have contractually agreed that neither party will be able to recover punitive damages from the other in connection with any claim or controversy that must be submitted to arbitration pursuant to the contract. ***See Complete Interiors, Inc. v. Behan***, 558 So.2d 48, 50-51 (Fla. 5th DCA 1990); ***Beaver Coaches***, 543 So.2d at 361. Accordingly, we reverse, and remand with directions that all the claims be submitted to arbitration.

Id. at 586-587. (emphasis supplied by Court).

CONCLUSION

For all of the above reasons, Cavalier submits that the Supreme Court of Alabama erred when it held that the public policy of the State of Alabama was not preempted by federal law and the Federal Arbitration Act and held that the agreement between the parties that the arbitrator shall have no authority to award punitive damages was not enforceable. It is crucial to interstate commerce that arbitration agreements be interpreted and enforced consistently under the Federal Arbitration Act. Cavalier respectfully moves that this Court grant this Petition for Writ of Certiorari to the Supreme Court of Alabama to resolve the conflict between the Supreme Court of Alabama and this Court, the United States Courts of Appeals for the First Circuit, the Fourth Circuit, the Seventh Circuit, the Eleventh Circuit, the United States District Court for the Northern District of Alabama, and the Florida Court of Appeals on the issue of whether the Federal Arbitration Act permits the parties to an arbitration agreement to agree that the arbitrator may not award punitive damages.



ROBERT W. BRADFORD, JR.
(Counsel of Record)
JOHN R. BRADWELL
Attorneys for Cavalier Manufacturing, Inc.
d/b/a Buccaneer Homes of Alabama, Inc.

OF COUNSEL:

HILL, HILL, CARTER, FRANCO,
COLE & BLACK, P.C.
425 SOUTH PERRY STREET
P.O. BOX 116
MONTGOMERY, ALABAMA 36101-0116
(334)834-7600

APPENDIX

October 5, 2001

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2001-2002

1000391

Cavalier Manufacturing, Inc., d/b/a Buccaneer Homes of Alabama, Inc.

v.

Angela Jackson and Shawyn Jackson
Appeal from Elmore Circuit Court

(CV-00-235)

On Return to Remand

HOUSTON, Justice.

On April 13, 2001, we remanded this case to the trial court for that court to determine whether the arbitration clause contained in the "acknowledgment and agreement" signed by the plaintiffs and by a representative of Cavalier Manufacturing, Inc. ("Cavalier"), is valid, although the clause prohibits the arbitrator from awarding punitive damages. See Cavalier Mfg., Inc. v. Jackson, [Ms. 1000391, April 13, 2001] ____ So.2d ____ (Ala. 2001). Pursuant to our instructions, the trial court heard oral argument, and it then issued the following order:

> "This matter is before the Court on remand from the Alabama Supreme Court with instructions that this Court make a determination as to whether the subject arbitration clause is valid in light of the fact

that the clause prohibits the arbitrator from awarding punitive damages. The Court, now having fully considered the opinion of the Alabama Supreme Court, along with the submissions and arguments of counsel concerning the issue at hand, hereby ORDERS as follows:

> "1. The Court finds that the subject arbitration clause is not valid or enforceable because it prohibits the arbitrator from awarding punitive damages. In this case the Plaintiffs have alleged, among other things, the tort of fraud. This Court holds that the prohibition against the award of punitive damages by an arbitrator denies them an adequate remedy. To hold otherwise would lead the logical mind to conclude that other types of damages could also be waived. In fact, to hold otherwise would force one to conclude that a drafter of an arbitration agreement could include in an arbitration agreement a provision which would waive damages of any sort or nature and even equitable relief. Such certainly cannot be the law in this State."

The arbitration clause in the acknowledgment and agreement reads:

> "10. ARBITRATION. All parties hereto acknowledge and agree that this Agreement and the performance of the transactions contemplated hereby evidence transactions which involve a substantial nexus with interstate commerce. Accordingly, any dispute, controversy or claim of any kind or nature which has arisen or may arise between the parties . . . (including any dispute, controversy or claim relating to the validity of this arbitration clause), whether arising out of past, present or future dealings between the parties . . . shall be governed by the Federal Arbitration Act and shall be settled by arbitration in accordance with the Commercial Arbitration Rules of

> the American Arbitration Association, and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.
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> "....
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> "... [T]he arbitrator shall have no power to award punitive damages or other damages not measured by the prevailing party's actual damage."

(Emphasis added.)

This appeal presents an issue of first impression in this State: Whether an arbitration clause that prohibits an arbitrator from awarding punitive damages is valid. For the following reasons, we hold that an arbitration clause that forbids an arbitrator from awarding punitive damages is contrary to public policy in Alabama and, thus, is void.

Alabama statutory law and public policy disfavor the specific performance of predispute arbitration agreements, and specific performance of such an agreement will not be ordered unless federal law preempts Alabama law as to a specific agreement. See Ala. Code 1975, § 8-1-41 (3)[1]; U.S. Const. art. VI; American Bankers Ins. Co. of Florida v. Crawford, 757 So. 2d 1125, 1137 (Ala. 1999) (Houston, J., concurring in part and dissenting in part); Woodmen of the World Life Ins. Soc'y v. Harris, 740 So. 2d 362, 366 (Ala. 1999); Wells v. Mobile County Bd. of Realtors, 387 So. 2d 140, 144 (Ala. 1980). Thus, an arbitration clause that prohibits an arbitrator from awarding punitive damages is enforceable only if federal law requires that it be enforced.

Although we recognize that federal policy favors arbitration, First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 945

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[1]Section 8-1-41(3) reads:

> " The following obligations cannot be specifically enforced:
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> "....
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> "(3) An obligation to submit a controversy to arbitration ...."

(1995), we note that, with respect to this issue, federal policy is unclear. Cavalier argues that the United States Supreme Court decided this issue in Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995). Cavalier states in its brief on appeal that the United States Supreme Court in Mastrobuono held that "private agreements to arbitrate are enforced according to their terms" and that a claim for punitive damages is determined by "what the contract has to say about arbitrability of [the] claim for punitive damages." (Cavalier's brief at p. 23.)

Cavalier incorrectly states the holding of Mastrobuono. The United States Supreme Court did not hold in Mastrobuono that private arbitration agreements are enforceable according to their terms; the language from Mastrobuono that is quoted in Cavalier's brief is actually a statement of the issue - - not the holding - - in that case. 514 U.S. at 53-54. Second, Mastrobuono involves an agreement entirely different from the agreement in this case. Unlike Cavalier's acknowledgment and agreement, the agreement in Mastrobuono did not make any express references to a claim for punitive damages. 514 U.S. at 59. Instead, the arbitration clause provided that any controversies "shall be settled by arbitration . . . ." Id. at note 2. Furthermore, the choice-of-law clause in the Mastrobuono agreement stated that the agreement "shall be governed by the laws of the State of New York"; New York law limits the power to award punitive damages to judicial tribunals. Id. at 53-55. In section 5 of the acknowledgment and agreement executed by the plaintiffs and Cavalier, the choice-of-law provision requires that Alabama law govern the agreement. Yet, Alabama law does not limit the power to award punitive-damages to the judiciary.

The United States Supreme Court has not addressed this issue, and the federal circuit and district courts are divided on whether an arbitration clause that prohibits punitive damages is valid. The plaintiffs in their brief on appeal rely on Paladino v. Avnet Computer Technologies, Inc., 134 F. 3d 1054 (11th Cir. 1998), and Graham Oil Co. v ARCO Products Co., 43 F. 3d 1244 (9th Cir. 1994), cert. denied 516 U.S. 907 (1995) in argu-

ing that the federal courts oppose arbitration clauses that forbid punitive damages.[2] In Paladino, the arbitration agreement read: "The arbitrator is authorized to award punitive damages for breach of contract only, and shall have no authority whatsoever to make an award of other damages." 134 F. 3d at 1056 (emphasis omitted). Paladino filed an action, alleging Title VII violations and seeking damages provided in Title VII. Id. at 1055. The United States Court of Appeals for the Eleventh Circuit stated that the trial court appropriately declined to order arbitration because the clause quoted above proscribed an award for damages that was provided by statute. Id. at 1060. The appellate court concluded that statutory remedies should be available to parties in arbitration. Id. at 1059.

Similarly, in Graham Oil, the arbitration clause stated: "The arbitrator(s) may not assess punitive or exemplary damages but may award both legal and equitable relief." 43 F. 3d at 1249. The plaintiffs filed an action, alleging violations of the Petroleum Marketing Practices Act ("PMPA"), which provided exemplary damages for certain claims. Id. at 1246. The United States Court of Appeals for the Ninth Circuit concluded that the clause was invalid because it caused the plaintiff to surrender important remedies mandated by the PMPA. Id. at 1248.

Other federal cases, however, have upheld arbitration clauses that bar punitive-damages awards. Baravati v. Josephthal, Lyon & Ross, Inc., 28 F. 3d 704, 709 (7th Cir. 1994) ("[P]arties . . . can stipulate that punitive damages will not be awarded."); and Willoughby Roofing & Supply Co. v. Kajima Int'l, Inc., 598 F. Supp. 353, 365 (N.D. Ala. 1984) ("If parties to an arbitration

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[2] The plaintiffs also cite Shankle v. B-G Maintenance Management of Colorado, Inc., 163 F.3d 1230 (10th Cir. 1999), and Cole v Burns International Security Services, 105 F. 3d 1465 (D.C. Cir. 1997), for the same proposition. Those cases, however, are distinguishable from this case because the courts of appeals in Shankle and in Cole focused on the validity of arbitration clauses that required the party invoking arbitration to pay a portion of the arbitrator's fees. The clauses in those cases, however, did not expressly limit an arbitrator's ability to award certain types of damages.

agreement desire to exclude the issue of punitive damages from the consideration of an arbitrator and reserve it for judicial hearing, they are free to specify that in their contract."), aff'd, 776 F.2d 269 (11th Cir. 1985). See also Automotive, Petroleum & Allied Indus. Employees Union, Local 618 v. Sears, Roebuck & Co., 581 F. Supp. 672 (E. D. Mo. 1984); and Humble Oil & Refining Co. v. Local Union 866, 271 F. Supp. 281 (S.D.N.Y. 1967).

Because the United States Supreme Court has not addressed this issue, and we can find no clear direction on this issue from federal law or federal policy, we conclude that Alabama law and public policy is not preempted. Therefore, we must determine whether an arbitration clause that forbids the arbitrator from awarding punitive damages is valid in a state that disfavors pre-dispute arbitration clauses.

The plaintiffs argue that an arbitration clause that prohibits an arbitrator from awarding punitive damages contravenes public policy in Alabama because, they say, the clause "strips [them] of the relief and/or damages they have a legal right to recover under their fraud claims." (Appellees' Response to the Appellant's Motion [to] File Supplemental Brief in Appeal of Order on Remand by the Circuit Court at 4.) While Alabama law allows an injured party in a fraud action to seek punitive damages, see Ala. Code 1975, § 6-11-20(a),[3] the plaintiffs are incorrect when they state that they have a legal right to punitive damages.

Punitive damages (or "exemplary damages") are unique from compensatory or actual damages.[4] While the public policy

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[3] Section 6-11-20(a), Ala. Code 1975, provides:

> "(a) Punitive damages may not be awarded in any civil action, . . . other than in a tort action where it is proven by clear and convincing evidence that the defendant consciously or deliberately engaged in . . . fraud . . . with regard to the plaintiff."

[4] The trial court is incorrect in stating that compensatory damages cannot be waived in an arbitration agreement. The right to compensatory damages is protected by § 13 of the Alabama Constitution of 1901. Clark v. Container Corp. of America, Inc., 589 So. 2d 184, 193 (Ala. 1991).

behind compensatory damages strives to compensate the wronged party, the public policy behind punitive damages is to punish the wrongdoer and to deter others from engaging in the same conduct in the future. Green Oil Co. v. Hornsby, 539 So. 2d 218, 222 (Ala. 1989); and City Bank of Alabama v. Eskridge, 521 So. 2d 931, 933 (Ala. 1988).[5] In Alabama, punitive damages are available in a fraud action only where the plaintiff proves by clear and convincing evidence that the wrongdoer's conduct is malicious, oppressive, or gross, and that the misrepresentation that is the basis of the fraud is made with the knowledge of falsity and with the purpose of injuring the party. § 6-11-20(a)[6] ; Eskridge, supra, at 933; Willoughby, supra, at 361; and Boulevard Chrysler-Plymouth, Inc. v. Richardson, 374 So. 2d 857, 860 (Ala. 1979).[7] Alabama law states, however, that an injured party is not entitled as a matter of right to punitive damages in fraud actions, Eskridge, supra, at 933, but that such damages are awarded at the discretion of the trier of fact, Green Oil, supra, at 222.

We hold that a predispute arbitration clause that forbids an arbitrator from awarding punitive damages is void as contrary to the public policy of this State - - to protect its citizens in certain legislatively prescribed actions from wrongful behavior and to punish the wrongdoer. If parties to an arbitration agreement waive an arbitrator's ability to award punitive damages, the door will open wide to rampant fraudulent conduct with few, if any, legal repercussions. The Legislature intended that punitive damages be available as a remedy in fraud actions, as evidence by the enactment of § 6-11-20(a). The Legislature is endowed with the exclusive domain to formulate public policy in Alabama, a

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[5] See Lorenzo Marinuzzi, Punitive Damages in Aribitration: The Debate Continues, 52 Disp. Resol. J. 67 (Summer 1997).

[6] See note 3 for text of § 6-11-20(a).

[7] See also Glower W. Jones, Awarding Punitive Damages by Arbitration, 7 Construction Law. 1, 23 (Aug. 1987).

domain upon which the judiciary shall not trod. American Bankers Ins. Co. of Florida, 757 So. 2d at 1137. Thus, we conclude that it is not within the province of parties to a predispute arbitration agreement to waive a punitive-damages award.

Despite our holding that arbitration agreements that bar punitive damages are void, the arbitration clause in this case is still enforceable. The acknowledgment and agreement reads:

> "8. If any provision of this Agreement is found to be unenforceable (including, without limitation, any provision of Section 10 hereof), such provision shall be considered severed from the remaining provisions of this Agreement (including, without limitation, the remaining provisions of Section 10 hereof), and such remaining provisions shall be and remain in full force and effect."

(Emphasis added.)

Therefore, the provision in Section 10, which provides that "the arbitrator shall have no power to award punitive damages" is unenforceable and is therefore severed from the remainder of the agreement. The remaining provisions of Section 10 remain in full force and effect.

For the foregoing reasons, we hold that the arbitration clause is valid and enforceable and that the trial court, therefore, erred when it denied Cavalier's motion to compel arbitration. We reverse the trial court's judgment denying the motion and remand the case for the entry of an order or proceedings consistent with this opinion.

REVERSED AND REMANDED.

Moore, C.J., and Lyons, Brown, Johnstone, Harwood, Woodall, and Stuart, JJ., concur.

See, J., dissents. SEE, Justice (dissenting).

The Supreme Court of the United States has held repeatedly that where interstate commerce is involved, the Federal Arbitration Act, 9 U.S.C. § 1 et seq. ("FAA"), preempts state-law

provisions that would prevent the enforcement of arbitration agreements. See, e.g., Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995) (holding that Alabama's anti-arbitration statute, § 8-1-41(3), Ala. Code 1975, which provides that a pre-dispute arbitration agreement is unenforceable in state courts, must yield to the FAA when the agreement is part of a contract affecting interstate commerce); see also Perry v. Thomas, 482 U.S. 483 (1987); Southland Corp. v. Keating, 465 U.S. 1 (1984); Moses Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967). "Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." Moses H. Cone Mem'l Hosp., 460 U.S. at 24; see also Lee v. Chica, 983 F.2d 883, 888 (8th Cir. 1993) ("Even if we accepted as valid Chica's argument that under state law the parties did not agree to arbitrate punitive damages because Minnesota law does not allow an awarding of punitive damages, it would not be dispositive in this case. This case is governed by federal law.").

The majority opinion discerns "no clear direction . . . from federal law or federal policy," ____So. 2d at ____, on the question whether parties may agree that an arbitrator will be precluded from awarding punitive damages and, therefore, concludes that it is free to apply Alabama law to determine whether the agreement in this case is enforceable. I believe that federal law is quite clear, that it requires enforcement of the parties' agreement, and that federal policy prevails under the supremacy clause of the Constitution of the United States. U.S. Const. art. VI, cl. 2.

In Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468, 479 (1989), the Supreme Court made clear that "the FAA's primary purpose [is to ensure] that private agreements to arbitrate are enforced

according to their terms." The Court held that "parties are generally free to structure their arbitration agreements as they see fit." Id. Cavalier argues, therefore, that parties may, by agreement, preclude the arbitrator from awarding punitive damages. Cavalier further argues that the Supreme Court of the United States, in Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995), signaled that an arbitration agreement including such a provision is enforceable. The Court summarized a party's agreement and the issue as follows:

> "Relying on our reasoning in Volt, respondents thus argue that the parties to a contract may lawfully agree to limit the issues to be arbitrated by waiving any claim for punitive damages. On the other hand, we think our decisions in Allied- Bruce, Southland, and Perry, make clear that if contracting parties agree to include claims for punitive damages within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration. Thus, the case before us comes down to what the contract has to say about the arbitrability of petitioners' claim for punitive damages."

514 U.S. at 58. The implication of this passage from Mastrobuono is that, as Cavalier argues, a provision in an arbitration agreement precluding the arbitrator from awarding punitive damages does not render the agreement unenforceable or outside the scope of the FAA. As the majority opinion of this Court accurately notes, Mastrobuono does not clearly hold that an arbitration clause that precludes the arbitrator from awarding punitive damages is enforceable; in fact, the holding of Mastrobuono is quite limited.[8] See Mastrobuono, 514 U.S. at

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[8] The holding in Mastrobuono is limited to deciding (1) whether the inclusion of the phrase "the laws of the State of New York" in the choice-of-laws section of the contract precluded punitive damages; (2) whether the contract should have been construed against Shearson; and (3) whether the punitive-damages award should be upheld.

71-72 (Thomas, J., dissenting). However, Mastrobuono is consistent with Volt and with decisions of various federal circuit courts of appeals that provide clear, direct support for Cavalier's argument.

Angela and Shawyn Jackson rely on two cases for the proposition that federal courts oppose arbitration clauses that forbid punitive damages: Paladino v. Avnet Computer Technologies, Inc., 134 F. 3d 1054 (11th Cir. 1998); and Graham Oil Co. v. ARCO Products Co., 43 F.3d 1244 (9th Cir. 1995), cert. denied, 516 U.S. 907 (1995). Neither addresses the question at issue here.

Graham Oil addressed a dispute between two corporations engaged in the business of distributing gasoline produces; the parties' arbitration agreement precluded the arbitrator from awarding punitive damages. The plaintiff sued, alleging violations of the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. §§ 2801-06. The federal district court granted the defendant's motion to compel arbitration. The United States Court of Appeals for the Ninth Circuit reversed, noting that the plaintiff's right to punitive damages, if it proved its case, was a "statutorily-mandated" right. 43 F.3d at 1247. Because the arbitration clause forfeited a right granted by federal law, the court held, the arbitration agreement violated federal law and was unenforceable. Graham Oil involving conflicting federal statutes - - the FAA and the PMPA. Here, the FAA conflicts not with another federal statute, but with a state statute, § 6-11-20(a), Ala. Code 1975).[9] The Supremacy Clause of the Constitution of the

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[9] Section 6-11-20(a), Ala. Code 1975, provides:

"(a) Punitive damages may not be awarded in any civil action, except civil actions for wrongful death pursuant to Sections 6-5-391 and 6-5-410, other than in a tort action where it is proven by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff. Nothing contained in this article is to be construed as creating any claim for punitive damages which is not now present under the law of the State of Alabama."

United States[10] requires that the state statute yield.

The arbitration provision in Paladino contained two separate clauses. The first stated that "the Company and I consent to the settlement by arbitration of any controversy or claim arising out of or relating to my employment or the termination of my employment." Paladino, 134 F.3d at 1056 (emphasis omitted). The second stated that "[t]he arbitrator is authorized to award damages for breach of contract only, and shall have no authority to make an award of other damages," Id. (Emphasis in Paladino). Avnet fired Paladino; in response, Paladino filed a lawsuit "alleging violations of Title VII, a Florida anti-discrimination statute and Florida's common law." Id. The United States Court of Appals for the Eleventh Circuit examined both clauses and determined that Paladino's claims were not subject to arbitration because the arbitration agreement did not "generally and fairly inform Paladino . . . that it covers statutory claims such as Title VII claims," and because the arbitration agreement was "fundamentally at odds with the purposes of Title VII because it completely proscribes an arbitral award of Title VII damages." Id. at 1059. Thus, Paladino, like Graham Oil, and unlike this case, involved a conflict between two federal statutes.

Although Graham Oil and Paladino are inapposite to this case, various other decisions by the federal courts of appeals have addressed the issue presented here.

In Bavarti v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704 (7th Cir. 1994), the plaintiff invoked arbitration and was awarded both compensatory damages and punitive damages. The defendants argued that the arbitrators had exceeded their authority in awarding punitive damages because the arbitration agreement did not explicitly grant the arbitrator the authority to award such

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[10] "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding."

damages. The arbitration provision did not prohibit an award of punitive damages, but the court noted that parties were free to contract as they saw fit:

> "Indeed, short of authorizing trial by battle or more doubtfully, by a panel of three monkeys, parties can stipulate whatever procedures they want to govern the arbitration of disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract. For that matter, parties to adjudication have considerable power to vary the normal procedures, and surely can stipulate that punitive damages will not be awarded."

28 F.3d at 709 (citations omitted). Furthermore, that court noted that under "arbitrations governed by [the FAA], arbitrators are authorized to award punitive damages unless the parties have withdrawn that power." Id. at 710 (emphasis added). The United States Court of Appeals for the Eleventh Circuit, in Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378 (11th Cir. 1988), held that "a clear provision in a contract prohibiting arbitrators from awarding punitive damages" would be enforceable. Id. at 1387 n. 16; see also Davis v. Prudential Securities, Inc., 59 F.3d 1186, 1192 n. 6 (11th Cir. 1995) ("Presumably, therefore, even after the Supreme Court's decision in Mastrobuono, parties wishing to avoid the imposition of punitive damages in arbitration may simply expressly exclude punitive damages in the arbitration agreement.").

The weight of authority supports the conclusion that the parties to an arbitration agreement are free to agree that an arbitrator may not award punitive damages. See Bavarti, supra; Bonar, supra; and Davis, supra; see also Gateway Techns, Inc. v. MCI Telecomms., Corp, 64 F.3d 993, 998 (5th Cir. 1995) ("If Virginia law allowed the arbitrator to impose punitive damages and if the arbitration contract did not expressly prevent the arbitrator from doing so, then such an award would have fallen under the arbitrator's broad discretion to decide damages and fashion remedial relief."); and Raytheon Co v. Automated

Business Sys., Inc., 882 F.2d 6, 12 (1st Cir. 1989) ("Parties that do wish arbitration provisions to exclude punitive damages claims are free to draft agreements that do so explicitly."). Whether such an agreement would be unenforceable under Alabama law is irrelevant, given the United States Supreme Court's clear command that arbitration agreements are to be "enforced according to their terms," Volt, 489 U.S. at 479, and given the supremacy of federal law. U.S. Const. art. VI, cl. 2; see also Allied-Bruce, supra.

I, therefore, respectfully dissent.

APPENDIX B

April 13, 2001

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2000-2001

1000391

Cavalier Manufacturing, Inc., d/b/a Buccaneer Homes of Alabama, Inc.

v.

Angela Jackson and Shawyn Jackson
Appeal from Elmore Circuit Court

(CV-00-235)

HOUSTON, Justice.

Shawyn Jackson and Angela Jackson sued Cavalier Manufacturing, Inc., d/b/a Buccaneer Homes of Alabama, Inc. (hereinafter "Cavalier"), alleging negligence, breach of contract, breach of express and implied warranties, and fraud, all in connection with the plaintiffs' purchase of a mobile home. The plaintiffs complained that the mobile home they purchased from Cavalier contained manufacturing defects. Cavalier filed a motion to dismiss, or in the alternative, a motion to compel arbitration of the plaintiffs' claims, pursuant to an arbitration clause contained in the "acknowledgment and agreement" signed by the plaintiffs and by a representative of Cavalier. The trial

court, without making any findings of fact, denied Cavalier's motion. Cavalier appeals.[1] We remand the instructions.

The arbitration clause in the acknowledgment and agreement reads:

> "10. ARBITRATION. All parties hereto acknowledge and agree that this Agreement and the performance of the transactions contemplated hereby evidence transactions which involve a substantial nexus with interstate commerce. Accordingly, any dispute, controversy or claim of any kind or nature which has arisen or may arise between the parties ... (including any dispute, controversy or claim relating to the validity of this arbitration clause), whether arising out of past, present or future dealings between the parties ... shall be governed by the Federal Arbitration Act and shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.
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> " ....
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> "The parties understood and agree that the arbitrator shall have all powers provided by law, and may award any legal or equitable relief, including, without limitation, money damages, declaratory relief, and injunctive relief; provided, however, that the arbitrator shall have no power to award punitive damages or other damages not measured by the prevailing party's actual damage. EACH OF THE PARTIES HERETO

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[1] The plaintiffs also sued Home Liquidation Company d/b/a C&J Manufactured Homes, Inc., whose representative signed the agreement that contained the arbitration clause. Home Liquidation filed a motion to dismiss, or, in the alternative, to stay proceedings and refer the plaintiffs' claims to arbitration. The record indicates that after hearing oral argument on the motion, the trial court took the case under "submission," but has not yet ruled on the motion.

> WAIVES ANY RIGHT TO A JURY TRIAL WITH RESPECT TO ANY CONTROVERSY BETWEEN THE PARTIES ...."

(Emphasis in original.)

A direct appeal is the appropriate procedure by which to seek review of a trial court's order denying a motion to compel arbitration. Homes of Legend, Inc. v. McCollough, [Ms. 1980921, Jan. 28, 2000] ____ So. 2d ____, ____ (Ala. 2000). This Court conducts a de novo review of the trial court's denial of the motion to compel arbitration. Patrick Home Ctr., Inc. v. Karr, 730 So. 2d 1171, 1171 (Ala. 1999).

Section 8-1-41(3), Ala. Code 1975, prohibits specific enforcement of "[a]n agreement to submit a controversy to arbitration." However, § 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides:

> "[A] written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

This Court has recognized that under this section the FAA preempts conflicting state law where an arbitration agreement is contained in a contract that involves interstate commerce. Ex parte Jones, 628 So. 2d 316 (Ala. 1993); Ex parte Phelps, 672 So. 2d 790 (Ala. 1995); see Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265 (1995). Thus, an arbitration provision in a contract that, in fact, involves interstate commerce is put " 'on the same footing' as other terms of a contract." Phelps, 672 So. 2d at 793 (quoting Allied-Bruce Terminix, 513 U.S. at 275).

We first address the question whether the FAA applies to the arbitration clause contained in the "acknowledgment and agreement" the plaintiffs signed when they purchased the mobile home. We note that nothing in the record suggests, and that the

plaintiffs do not allege, that the acknowledgment and agreement itself, entered into between the plaintiffs and Cavalier, is invalid or unenforceable. Therefore, the FAA will apply to the arbitration clause if the "acknowledgment and agreement" is a contract "involving interstate commerce in fact, so as to be within Congress's power to regulate under the Commerce Clause." Coastal Ford, Inc. v. Kidder, 694 So. 2d. 1285, 1287 (Ala. 1997).

This Court, in Southern Energy Homes, Inc. v. McCray, [Ms. 1991435, Dec. 1, 2000] ____ So. 2d ____ (Ala. 2000), stated that "[a]n Alabama resident's purchase of a new mobile home – even one manufactured in Alabama – can be a transaction that substantially affects interstate commerce." Whether it is such a transaction depends on the facts of the purchase, including, among others, such facts as the source of the mobile home or its components. In McCray, an Alabama resident purchased a mobile home that had been manufactured by Southern Energy Homes, a Delaware corporation with manufacturing facilities in Alabama. ____ So. 2d at ____n.1. The homes manufactured in Alabama were constructed with parts shipped to the Alabama plants from out-of-state suppliers. Id. at n. 1. This Court held that this evidence indicated that the purchase of the mobile home substantially affected interstate commerce. Id.

Similarly, the Jacksons' purchase of their mobile home from Cavalier substantially affected interstate commerce. Cavalier is a Delaware corporation doing business in Marion County, Alabama, as Buccaneer Homes. According to the record, Buccaneer Homes, the company that constructed the plaintiffs' home, manufactures mobile homes with components furnished by out-of-state suppliers. Therefore, we conclude that this transaction substantially affected interstate commerce, and that the FAA does apply to make the arbitration provision in this case enforceable. We now address the arguments Cavalier makes on appeal.

Cavalier argues that the trial court erred in denying the motion to compel arbitration, because, it says, the trial court

misapplied the current caselaw on arbitration. Specifically, Cavalier argues: (1) that the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 et seq., does not prohibit enforcement of an arbitration clause in an agreement, other than an arbitration clause in a warranty; (2) that the financial hardship the plaintiffs claimed does not void the arbitration agreement; (3) that the plaintiffs' tort claim is subject to binding arbitration; and (4) that the arbitration agreement is valid even though it precludes the recovery of punitive damages.

With respect to the first argument, Cavalier contends that the Magnuson-Moss Act does not prohibit the enforcement of arbitration clauses in agreements other than warranties.[2] The plaintiffs, in their response brief on appeal, argue that the Magnuson-Moss Act provides that the supplier of a consumer product may establish a mandatory dispute-settlement procedure only if the terms of the settlement are included in a warranty. However, a review of the language of the Act indicates that the Act governs only warranties and no other documents. Thus, its provisions concerning arbitration clauses, 15 U.S.C. § 2310, are inapplicable to this case, which involves an agreement that is not a warranty.

Regarding the second argument, Cavalier argues that the financial hardship the plaintiffs claim does not void the arbitration agreement. The plaintiffs, in their response brief on appeal, argue that the arbitration clause is unenforceable because, they say, they cannot afford the cost of arbitrating this dispute. In Green Tree Financial Corp. v. Wampler, 749 So. 2d 409 (Ala. 1999), this Court wrote:

> "Because the general principles of Alabama contract law do not excuse performance on grounds of financial hardship, we cannot allow a party's poverty, stand-

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[2] This Court, in Southern Energy Homes, Inc. v. Ard, 772 So. 2d 1131 (Ala. 2000), held that the Magnuson-Moss Act does not invalidate arbitration provisions in a warranty. 772 So. 2d at 1135; see Southern Energy Homes, Inc. v. Lee, 732 So. 2d 994, 1004-13 (Ala. 1999) (See, J., dissenting) (overruled by Ard, 772 So. 2d 1131).

> ing alone and independent of other considerations justifying a finding of unconscionability, to constitute a defense to enforcement of an arbitration agreement."

749 So. 2d at 416.

Although the record shows that Angela Jackson was disabled and unemployed when the trial court denied Cavalier's motion to compel arbitration, the record contains no evidence of the finances of Shawyn Jackson, the other plaintiff in this case. Furthermore, the record contains no information about how much arbitration would cost the plaintiffs. The plaintiffs, in their response brief on appeal, state approximate dollar amounts; however, their calculations appear to be nothing more than mere speculation. "The 'risk' that [the plaintiffs] will be saddled with ... costs is too speculative to justify the invalidation of an arbitration agreement." Palm Harbor Homes, Inc. v. Turner, [Ms 1991579, Feb. 9, 2001] ____ So. 2d ____, ____ (Ala. 2001) (quoting Green Tree Fin. Corp.- Alabama v. Randolph, ____ U.S. ____, ____, 121 S.Ct. 513, 522 (2000)). Therefore, the plaintiffs have failed to show that financial hardship should prohibit enforcement of the arbitration provision against them.

Finally, as to the third and fourth arguments, Cavalier avers that all the plaintiffs' claims, including their tort claims, are subject to the arbitration clause. The plaintiffs, in their response brief on appeal, argue that their fraud claim is not arbitrable because, they say, the arbitration clause denies them an adequate remedy by prohibiting the arbitrator from awarding punitive damages.

A court reviewing a motion to compel arbitration must determine " ' whether the language or "scope" of the arbitration clause is broad enough to encompass the claims sought to be arbitrated.'" Kidder, supra, at 1288 (quoting Allied-Bruce Terminix Cos. v. Dobson, 684 So. 2d 102, 103 (Ala. 1995)). Moreover, a party may not avoid broad language in an arbitration clause by attempting to cast its complaint in tort rather than contract.

Beaver Constr. Co. v. Lakehouse, L.L.C., 742 So. 2d 159, 165 (Ala. 1999). The question whether an arbitration clause in a contract requires arbitration of a given dispute remains a matter of state-law contract interpretation. 684 So. 2d at 107. This Court, in Homes of Legend, Inc. v. McCollough, supra, explained the general Alabama rules of contract interpretation:

> "[T]he intent of the contracting parties is discerned from the whole of the contract. Where there is no indication that the terms of the contract are used in a special or technical sense, they will be given their ordinary, plain, and natural meaning."

McCollough, supra, at ____. (Citation omitted.)

Relying on this canon of contract interpretation, we hold that the fraud claim is arbitrable under the provision. The language of the arbitration provision is clear and unambiguous: "[A]ny dispute, controversy or claim of any kind or nature which has arisen or may arise between the parties" shall be arbitrated. The plain meaning of the phrase "any claim" includes the fraud claim. Furthermore, the question whether Cavalier fraudulently misrepresented the condition of the mobile home to the plaintiffs is a "dispute ... which has arisen ... between the parties" regarding a "past ... dealing[] between the parties" (the plaintiffs' purchase of a mobile home from Cavalier in 1998).

The plaintiffs, in their response brief on appeal, argue that the arbitration clause is unenforceable because it does not provide relief equivalent to the remedies that would be available in the trial court. The arbitration provision specifically prohibits the arbitrator from awarding punitive damages ("the arbitrator shall have no power to award punitive damages"). However, the same provision requires that challenges to the validity of the arbitration clause are to be decided by the arbitrator ("any dispute ... relating to the validity of this arbitration clause ... shall be settled by arbitration"). Thus, under the terms of the arbitration clause, the arbitrator determines the validity of the clause.

However, as this Court explained in American General

Finance, Inc. v. Branch, [Ms. 1990887, Dec. 22, 2000] ____ So. 2d ____ (Ala. 2000), issues concerning the validity of arbitration clauses are to be decided by the court:

> "Nevertheless, 'a determination that, by the terms of the arbitration clause, the arbitrator is to decide issues of arbitrability does not end the inquiry.' Green Tree Fin. Corp. v. Wampler, 749 So. 2d 409, 413 (Ala. 1999). 'Where the attack is addressed to the arbitration clause itself, as opposed to the contract as a whole, the court, and not the arbitrator, resolves the issue.' Id. Thus, the threshold 'issue of unconscionability of an arbitration clause is a question for the court and not the arbitrator.' Id. at 415 (emphasis added). See also Ex parte Napier, 723 So. 2d 49 (Ala. 1998); Ex parte Dan Tucker Auto Sales, Inc., 718 So. 2d 33, 41 (Ala. 1998) (Lyons, J., concurring specially.)"

____ So. 2d at ____. The record indicates that the trial court never made a determination about the validity of the clause.

Therefore, we remand this case with instructions for the trial court to determine whether the arbitration clause is valid even though it prohibits the arbitrator from awarding punitive damages. The trial court shall make a return to this Court within 30 days from the release of this opinion.

REMANDED WITH INSTRUCTIONS.

See, Brown, Johnstone, Harwood, Woodall, and Stuart, JJ., concur.

Lyons, J., concurs specially.

Moore, C.J., dissents.

LYONS, Justice (concurring specially).

I concur. See my special concurrence on application for rehearing in American General Finance, Inc. v. Branch, [Ms. 1990887, December 22, 2000] ____ So. 2d ____ (Ala. 2000), dealing with when the court, as opposed to the arbitrator, decides issues concerning the validity of an arbitration clause.

MOORE, Chief Justice (dissenting).

I would like to focus on one portion of the arbitration clause that is the subject of this case and point out a concern that should trouble this court. The clause, among other things, states:

> "[T]he arbitrator shall have no power to award punitive damages or other damages not measured by the prevailing party's actual damage."

I recognize that in Alabama there is no right to punitive damages; that may explain why this Court found no fault with this portion of the clause. However, this portion troubles me, because I have difficulty seeing a logical end to such waivers.

If, as in this case, the parties can waive a right to seek punitive damages, then what will prevent a party from drafting an arbitration agreement containing waivers of other kinds of damages? What about damages for emotional distress? What about future damages? What about compensatory damages? What about any damages whatsoever? I understand that I have taken this argument to an extreme, but it is a question that needs to be asked, and the extreme is not an illogical one. If, before a dispute arises, parties to a contract can agree to waive the right to trial by jury, a right guaranteed by both the Alabama Constitution and the United States Constitution, then what possible principle of law or contract would prevent them from waiving every single political right that this republic says that the individual is entitled to? Civil rights, rights to property, even the right to liberty, might be subject to contract.

For example, could an employee waive the right to any damages for a discharge made in retaliation for filing a workers' compensation claim? The employer makes no demand upon an employee if it demands the agreement prior to employment. If the employee signs such an agreement, why should a court not enforce it? I think the employer could claim an interest in protecting his business's financial position by preventing lawsuits alleging retaliatory discharge. Could the employee give up rights against racial or sexual discrimination, the duty to report the employer to the police for criminal activity such as an assault upon the employee, the right to a day's pay for a day's work, the

right to ever leave the job,[3] the right not to have his or her personal effects or home searched?[4]

I recognize that this particular Court would most certainly stop the precipitous slide that would cause the loss of all rights by contract, at some point before the contractual waiver of these rights was enforced. My concern is with our reasoning in support of abrogating such an agreement. What would buttress the rationale? How would we justify the denial of the right to bargain away the right to be free from unlawful intrusion into our private affairs or the right to choose a job? Where is the consistency of logic? Or would we simply impose an ad hoc standard of review, allowing the loss of some rights by contract and not others? Where do we draw the line? I am not yet prepared to draw the line brightly. However, I do draw the line at the loss of a kind of remedy that should be imposed against a defendant that acts recklessly, intentionally, or maliciously against another. I do not think a guilty party should be able to walk away from an injurious act and be able to call it a financial "wash." Those who harm others should feel the sting of a judgment for damages. Could a thief contract with his victim to avoid any punishment beyond paying back the exact amount he stole?

This Court needs to address the problem of boundaries with respect to agreements of this sort. Where do we draw the line as to what someone can waive in a voluntary agreement? Because a person should not be able to avoid punishment for injuring another by bargaining with the targeted victim, I dissent. I dissent also because I believe the validity of the arbitration agreement should be determined by the trial court – not by arbitrators.

---

[3] Our caselaw, as well as § 8-1-41(1), Ala. Code 1975, prohibits a court from ordering enforcement of personal-service contracts, e.g., contracts that prevent a person from leaving a job. Such a contract smacks of slavery.

[4] I know that these scenarios appear utterly beyond the realm of possibility; however, the rights I have just mentioned would, in essence, relegate to a condition approximating chattel slavery the particular employee who agreed to them.

IN THE CIRCUIT COURT FOR
ELMORE COUNTY, ALABAMA

ANGELA JACKSON, SHAWN JACKSON, Plaintiffs, v. CAVALIER MANUFACTURING, INC. d/b/a BUCCANEER HOMES OF ALABAMA, INC., and HOME LIQUIDATION COMPANY, INC. d/b/a C & J MANUFACTURED HOMES, INC., ET AL., Defendants.	)	CIVIL ACTION NO. CV-00-235

MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION TO ENFORCE BINDING ARBITRATION AND STAY PROCEEDINGS

COME NOW Defendants Cavalier Manufacturing, Inc. and Buccaneer Homes of Alabama, Inc. (a division of Cavalier Manufacturing, Inc.), and , pursuant to 9 U.S.C. § 2 and ***Allied-Bruce Terminix Companies, Inc. v. Dobson,*** move that this Court order the Plaintiffs to submit to binding arbitration and stay the trial of this action until arbitration has been had subject to the rules of the American Arbitration Association.

"s/_____"
JOHN R. BRADWELL (BRA055)
Attorney for Defendants Buccaneer Homes of
Alabama, Inc. and Cavalier Manufacturing, Inc.

OF COUNSEL:

HILL, HILL, CARTER, FRANCO,
COLE & BLACK, P.C.
425 SOUTH PERRY STREET
P.O. BOX 116
MONTGOMERY, ALABAMA 36101-0116
(334)834-7600

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon counsel listed below by placing a copy of the same in the U.S. Mail, postage prepaid, on this the 18th day of July, 2000.

James G. Bodin, Esq.
G. William Gill, Esq.
McPhillips, Shinbaum & Gill, L.L.P.
516 South Perry Street
P.O. Box 64
Montgomery, Alabama 36101

Home Liquidation Company
d/b/a C & J Manufactured Homes, Inc.
414 Still Street
Centreville, Alabama 35042

"s/_____"
OF COUNSEL

Supreme Court, U.S.
FILED
MAR 8 2002
CLERK

(2)

No. 01-960

IN THE

Supreme Court of the United States

CAVALIER MANUFACTURING, INC.
D/B/A BUCCANEER HOMES OF ALABAMA, INC.,

Petitioner,

v.

ANGELA JACKSON AND SHAWYN JACKSON,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

F. Paul Bland, Jr.
(Counsel of Record)
Michael J. Quirk
Trial Lawyers for Public Justice , P.C.
1717 Massachusetts Avenue, NW, Suite 800
Washington, D.C. 20036
(202) 797-8600

G. William Gill
James G. Bodin
McPhillips, Shinbaum & Gill, L.L.P.
516 South Perry Street
Montgomery, Alabama 36109
(334) 262-1911

Arthur H. Bryant
Trial Lawyers for Public Justice, P.C.
One Kaiser Plaza, Suite 275
Oakland, CA 94612-3684
(510) 622-8150

2088

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 6

I. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *MASTROBUONO* 6

A. *Mastrobuono Is* Readily Distinguishable From This Case. 6

B. This Court Has Consistently Held That The FAA Does Not Alter Or Override Generally Applicable State Laws. 7

C. This Court Has Consistently Stated That Arbitration Agreements May Involve A Change In Forum But Not A Waiver Of Or Failure to Effectively Vindicate Substantive Laws. 9

II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY OF THE OTHER CASES CITED BY CAVALIER. 11

CONCLUSION 15

TABLE OF AUTHORITIES

Cases:

Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704 (7th Cir. 1994) 11, 14

Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378 (11th Cir. 1988) 11

Cole v. Burns Int'l Security Serv's, 105 F.3d 1465 (D.C. Cir. 1997) 10

Davis v. Prudential Securities, Inc., 59 F.3d 1186 (11th Cir. 1995) 11, 12

DeGaetano v. Smith Barney, Inc., 983 F. Supp. 459 (S.D.N.Y. 1997) 10

LaChance v. Northeast Publishing, Inc., 965 F. Supp. 177 (D. Mass. 1997) 10

Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996) 1, 7

EEOC v. Waffle House Corp., 122 S. Ct. 754 (2002) 2, 5

Ex Parte Thicklin, 2002 WL 27925 (Ala. 2002) 2, 5, 8

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) 11

Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306 (6th Cir. 2000) 10

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 8, 9

Glass v. Kidder Peabody & Co., Inc.,
114 F.3d 446 (4th Cir. 1997) 12

Graham Oil Co. v. ARCO Products Co., 43 F.3d 1244
(9th Cir. 1994) 10

Hooters of America, Inc. v. Phillips, 173 F.3d 933
(4th Cir. 1999) 14

Martens v. Smith Barney, Inc., 181 F.R.D. 243
(S.D.N.Y. 1998) 10

Mastrobuono v. Shearson Lehman Hutton, Inc.,
514 U.S. 52 (1995) ..... *passim*

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985) 8, 9

Paladino v. Avnet Computer Tech., Inc., 134 F.3d 1054
(11th Cir. 1998) 10, 14

Parrett v. City of Connersville, Ind., 737 F.2d 690
(7th Cir. 1984) 10

Penn v. Ryan's Family Steak Houses, Inc., 269 F.3d 753
(7th Cir. 2001) 14

Perez v. Globe Airport Security Services, 253 F.3d 1280
(11th Cir. 2001) 10

Pitchford v. Oakwood Mobile Homes, Inc.,
124 F.Supp.2d 958 (W.D. Va. 2000) 3

Powertel v. Bexley, 743 So.2d 570
(Fla. Dist. Ct. App. 1999) 14

Primeco Personal Communications v. Commonwealth Distributors, Inc., 740 So.2d 585 (Fl. Dist. Ct. App. 1999) 12, 14

Raesly v. Grand Housing, Inc., 105 F.Supp.2d 562 (S.D. Miss 2000) 3

Raytheon Co. v. Automated Business Systems, Inc., 882 F.2d 6 (1st Cir. 1989) 11, 14

Reece v. Finch, 562 So.2d 195 (Ala. 1990) 8

Securities Indus. Ass'n v. Connolly, 883 F.2d 1114 (1st Cir. 1989) 14

Willoughby Roofing & Supply Co. v. Kajima Int'l, Inc., 598 F. Supp. 353 (N.D. Ala. 1984) 11

Wilson v. Waverlee Homes, Inc., 954 F.Supp. 1530 (M.D. Ala. 1997), aff'd, 127 F.3d 40 (11th Cir. 1997) .. 3

Statutes:

Alabama Code § 6-11-20 7

Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* 6, 7

INTRODUCTION

The opinion of the Alabama Supreme Court in this case and the question presented in the Petition for Certiorari do not warrant a grant of this Court's discretionary review. This Court has consistently instructed that arbitration clauses need not be enforced if they violate generally applicable principles of state contract law, and do not allow claimants to vindicate their statutory rights. That is what happened in this case.

The Court below held that a contractual provision prohibiting a party from making a claim under Alabama statutes for punitive damages violated the public policy of Alabama. Petitioner Cavalier Manufacturing, Inc. ("Cavalier") asserts that the decision below conflicts with this Court's decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). Cavalier points to language in *Mastrobuono* stating that courts should "enforce the arbitration clause as written" and argues that, by striking the contract's ban on punitive damages, the court below failed to enforce the clause as written.

Cavalier's argument overstates and misconstrues *Mastrobuono*. This Court did not hold, and has never held, that any provision included in a contract section under the heading of "arbitration" must be enforced without limitation. In fact, the Alabama Supreme Court's opinion is entirely consistent with two recurring themes from this Court's opinions that qualify the notion that arbitration clauses must be enforced as written.

First, this Court has held that the FAA permits states to apply generally applicable contract defenses to arbitration clauses. *See, e.g., Doctor's Association, Inc. v. Casarotto*, 517 U.S. 681 (1996). In this case, the state court applied such a body of state law to invalidate a limitation on liability, while still enforcing the arbitration clause and compelling arbitration of all claims. Apparently hoping to suggest that the state court was not applying "generally applicable law," Cavalier portrays that decision as an

attack by the state court on the Federal Arbitration Act ("FAA"). This is hardly the case. The Alabama Supreme Court *granted* Cavalier's motion to compel arbitration, and all claims in this case will be arbitrated. This Petition does not raise the question of whether an arbitrator or a court will hear this case, but instead raises the question of whether the FAA overrides Alabama's generally applicable contract law relating to exculpatory clauses. The court below held that Alabama law forbids parties from entering into any contract that denies parties the substantive right to recover punitive damages under Alabama statutes. As the Alabama Supreme Court has made clear, this prohibition on waivers of statutory punitive damages claims is a rule of law that Alabama courts apply without respect to the forum in which a case is heard. *See Ex Parte Thicklin*, 2002 WL 27925 (Ala. 2002).

This Court has also consistently recognized a second limitation on the notion that arbitration clauses are to be enforced as written. This Court has consistently stated that arbitration clauses are to be enforced only where they permit claimants to effectively vindicate their statutory rights. *See EEOC v. Waffle House Corp.*, 122 S. Ct. 754, 755 n. 10 (2002). Because the ban on punitive damages in Cavalier's contract would not permit its customers (such as the Jacksons, the Respondents here) to vindicate their substantive statutory rights under Alabama law, it is entirely consistent with this Court's opinions for Alabama law to bar such a waiver.

Finally, Cavalier claims that the opinion below conflicts with a number of decisions by other courts. In fact, none of the cases cited by Cavalier conflict with the opinion below, as none involves a challenge to an arbitration clause that prohibits the award of punitive damages, and none involves a generally applicable body of state substantive law such as limitations on exculpatory clauses that strip consumers of statutory remedies. Instead, nearly all of the cases cited by Cavalier involve the readily distinguishable setting where courts affirmed decisions by arbitrators who had awarded punitive damages to a party.

For these reasons, the Court should not grant review on the question presented in the Petition for Certiorari.

STATEMENT OF THE CASE

The mobile home that Petitioners Angela Jackson and Shawyn Jackson purchased from Respondent Cavalier is seriously defective. After failing to obtain redress for the various defects to the home, the Jacksons sued Cavalier, alleging negligence, breach of contact, breach of express and implied warranties, and fraud. After Cavalier moved to compel arbitration, the Jacksons argued (among other things) (a) that their claims for breach of express warranty under the Magnuson-Moss Warranty Act could not be forced into arbitration; (b) that arbitration under Petitioner's clause would be prohibitively expensive; and (c) that the clause's ban on punitive damages did not permit them to effectively vindicate their substantive statutory rights. The trial court denied Cavalier's Motion to Compel Arbitration without making any finding of fact.

In its first opinion in this case, decided on April 13 2001, the Alabama Supreme Court rejected most of the Jacksons' arguments against the arbitration clause. It held that "the Magnuson-Moss Act does not invalidate arbitration provisions in a warranty disregarding substantial federal precedent to the contrary."[1] The Court also rejected the Jacksons' arguments about the cost of arbitration, finding that the Jacksons had not shown "financial hardship," even though "the record shows that Angela Jackson was disabled and unemployed when the trial court denied Cavalier's Motion to Compel Arbitration. . . ." App. B at 6. On the final issue, however, the Court remanded "this case with instructions for the trial court to determine whether the arbitration clause is valid even though it prohibits the arbitrator from awarding punitive damages." App. B at 8.

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[1] *See, e.g., Wilson v. Waverlee Homes, Inc.*, 954 F.Supp. 1530 (M.D. Ala. 1997), aff'd, 127 F.3d 40 (11th Cir. 1997); *Pitchford v. Oakwood Mobile Homes, Inc.*, 124 F.Supp.2d 958 (W.D. Va. 2000); *Raesly v. Grand Housing, Inc.*, 105 F.Supp.2d 562 (S.D. Miss 2000).

On remand, the trial court held:

> The Court finds that the subject arbitration clause is not valid or enforceable because it prohibits the arbitrator from awarding punitive damages. In this case, the Plaintiffs have alleged, among other things, the tort of Fraud. This Court holds that the prohibition against the award of punitive damages by an arbitrator denies [the plaintiffs] a[n] adequate remedy.

In its second opinion in this case, dated October 5, 2001, the Alabama Supreme Court held "that an arbitration clause that forbids an arbitrator from awarding punitive damages is contrary to public policy in Alabama and, thus is void." (Appendix A, p. 3). The court noted that Cavalier had claimed that this Court's opinion in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) provides that a contract may bar arbitrators from providing punitive damages. The Alabama Supreme Court explained, however, that the quoted language *Mastrobuono* did not dictate the outcome in this case. The court below pointed out that the dicta cited by Cavalier from *Mastrobuono* was in the setting of an agreement "governed by the laws of the State of New York." Appendix A at 4, citing *Mastrobuono*, 514 U.S. at 53. The significance of this, as the Alabama Supreme Court went on to explain, was that New York state law generally prohibits arbitrators from awarding punitive damages. In such a state, where the state's laws place such a sharp limitation on the power of arbitrators, there is no possible issue of conflict between an arbitration contract containing a prohibition on punitive damages and state public policy. New York's limitation on the power of arbitrators -- which reflects a suspicion of and hostility towards the arbitration process -- is not found in Alabama law. Since Alabama law permits arbitrators to enforce the statutory rights of Alabama parties, the Court held that the cited language in *Mastrobuono* did not apply and that Alabama law could and does prohibit arbitration contracts that prevent arbitrators from vindicating the rights found in Alabama statutes.

The Alabama Supreme Court also set out the principal reason underlying the rule of public policy prohibiting parties from entering into contracts that bar statutory punitive damages, and that reason is plainly applicable to all contracts, whether they involve arbitration or not:

> We hold that a predispute arbitration clause that forbids an arbitration from awarding punitive damages is void as contrary to the public policy of this State – to protect its citizens in certain legislatively prescribed actions from wrongful behavior and to punish the wrongdoer. If parties to an arbitration agreement waive any arbitrator's ability to award punitive damages, the door will open wide to rampant fraudulent conduct with few, if any, legal repercussions.

Appendix A at 7. This language is strikingly similar to statements that this Court made relating to the role of punitive damages in this Court's recent decision in *EEOC v. Waffle House, Inc.*, 122 S.Ct. 754, 765 (2002). In another case decided shortly afterwards, the Alabama Supreme Court explained that the state's public policy against waivers of statutory punitive damages claims applies whether a contract involves arbitration or not. *See Ex Parte Thicklin*, 2002 WL 27925 (Ala. 2002).

Nonetheless, after holding that the contract's prohibition on punitive damages was unenforceable, the Alabama Supreme Court went on to "hold that the arbitration clause is valid and enforceable and that the trial court, therefore, erred when it denied Cavalier's motion to compel arbitration." Appendix A at 8.

REASONS FOR DENYING THE WRIT

There is no reason for this Court to review the holding of the Alabama Supreme Court in this case. The opinion of the court below is consistent with this Court's decisions, and is simply an application of generally applicable Alabama contract law. The Alabama

Supreme Court's decision is also consistent with this Court's oft-stated premise that arbitration is to be a forum where parties may effectively vindicate their statutory rights. Petitioner has not identified a single case where a court enforced a purported waiver of punitive damages under the auspices of the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, where the generally applicable substantive law of the state or federal statute at issue prohibited such a waiver. The Court therefore should not take up the question presented in the Petition for Certiorari.

I. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *MASTROBUONO*.

A. *Mastrobuono Is* Readily Distinguishable From This Case.

Cavalier claims that the Court's decision below conflicts with this Court's decision in *Mastrobuono*, pointing to language in that case where this Court spoke of enforcing arbitration clauses as written. In fact, the decision below in no way conflicts with *Mastrobuono*.

To begin with, Cavalier reads far too much into the brief snippet of language that it extracts from *Mastrobuono*. In fact, this Court has recognized two major exceptions to the doctrine that arbitration clauses are to be enforced as written. First, this Court has recognized that courts may decline to enforce arbitration clauses where they conflict with generally applicable state contract law. Second, this Court has recognized that arbitration clauses may not be enforced if they do not permit parties to effectively vindicate their statutory rights. When these two exceptions are recognized, it becomes clear that the decision below does not conflict with this Court's decision in *Mastrobuono*.

Mastrobuono did not involve a challenge to a contract provision prohibiting arbitration clauses, but instead involved a

challenge to an arbitrator's award of punitive damages to a party. Accordingly, the case did not involve a generally applicable body of state law, such as that applied by the court below here. In addition, the arbitration clause in *Mastrobuono* did not strip any party of his or her ability to effectively vindicate any substantive statutory right under state law, as did the arbitration clause in this case.

The phrase in *Mastrobuono* seized upon by Petitioner that punitive damages "are a matter of contract" is thus bereft of the context relevant here. As a general matter, parties may contract away any of their rights, unless there is some affirmative body of substantive law that prohibits such a waiver. It was against this general backdrop, and not in the face of any particular positive state law to the contrary, that this Court suggested in *Mastrobuono* that parties are free to contract as they wish with respect to the right to recover punitive damages.

B. This Court Has Consistently Held That The FAA Does Not Alter Or Override Generally Applicable State Laws.

The Alabama Supreme Court's holding -- that a court may not enforce a contractual provision prohibiting the award of punitive damages under Alabama statutes[2] -- is a routine application of the Federal Arbitration Act's express provisions and this Court's interpretations of the Act. Section 2 of the FAA states that contractual arbitration clauses are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

The Alabama Supreme Court's decision below is consistent with the command of the FAA and this Court's opinions interpreting the Act to subject contractual arbitration provisions to the same rules of state law that apply to other contracts. In *Doctor's Associates,*

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[2] Punitive damages in Alabama are a creature of statute. *See* Alabama Code § 6-11-20.

Inc. v. Casarotto, 517 U.S. 681 (1996), this Court explained that Section 2 of the FAA places arbitration agreements on the same footing with other contracts so that "generally applicable contract defenses such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Id.* at 687. Likewise, in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court noted Section 2's savings provision and warned that "'courts should remain attuned to well-supported claims that the agreement resulted from the sort of fraud or overwhelming economic power that would provides grounds for the revocation of any contract.'" *Id.* at 33 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985) (internal quotation omitted)). The Court below did just this, applying generally applicable state law.

Alabama law forbidding parties from waiving liability for punitive damages is a generally applicable body of law that applies to all contracts, whether they involve arbitration or not. As the Alabama Supreme Court specifically stated in a case decided just a few weeks after the second opinion in this case:

> [I]t violates public policy for a party to contract away its liability for punitive damages, regardless whether the provision doing so was intended to operate in an arbitral or judicial forum. Thus enforcement of this portion of the arbitration agreement violates public policy and its enforcement would be unconscionable.

Ex Parte Thicklin, 2002 WL 27925 (Ala. 2002). This is consistent with longstanding Alabama case law. *See, e.g., Reece v. Finch*, 562 So.2d 195, 199 (Ala. 1990) ("exculpatory agreements are not valid as to extreme forms of negligence or any conduct that constitutes an intentional tort.")

The Alabama Supreme Court's decision in this case is thus not directed against arbitration, but against a limitation on liability

that is not unique to or even related to arbitration. This conclusion is reinforced by the fact that the Court below compelled arbitration in this case. Cavalier suggests that the state court here was not applying generally applicable law, but was instead acting out of hostility to arbitration. But that is not so. The Court below has required the Jacksons to pursue their claims in arbitration, and the arbitral forum is no longer at issue in this case. This Petition, therefore, does not truly focus on arbitration, but instead on Alabama state contract law for exculpatory contracts.

C. This Court Has Consistently Stated That Arbitration Agreements May Involve A Change In Forum But Not A Waiver Of Or Failure to Effectively Vindicate Substantive Laws.

This Court has stated that arbitration is acceptable as an alternative to litigation in court because it is simply a "different forum" – one with somewhat different and simplified rules – but nonetheless one in which the basic mechanisms for obtaining justice permit a party to "effectively vindicate" his or her rights. *E.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991), *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985). This Court has explained that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Gilmer v. Interstate/ Johnson Lane Corp*, 500 U.S. 20, 26 (1991).

Numerous lower courts have interpreted this Court's direction in the same manner as the Court below, and directly contrary to the approach urged by Cavalier. In case after case, courts around the nation have applied this Court's jurisprudence to hold that arbitration provisions which limit a party's access to substantive statutory legal remedies that are available in court may not be

enforced.[3] Under Cavalier's theory, all of these cases contradict this Court's holding in *Mastrobuono* and were wrongly decided because they did not enforce the arbitration clauses at issue "as written." The truth is that these cases – just like the Alabama Supreme Court's decision below here – merely followed this Court's guidance that

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[3] *See, e.g., Perez v. Globe Airport Security Services*, 253 F.3d 1280, 1286-87 (11th Cir. 2001) (arbitration clause that prevents prevailing Title VII plaintiff from recovering attorney's fees unenforceable); *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 313 (6th Cir. 2000) ("[E]ven if arbitration is generally a suitable forum for resolving a particular statutory claim, the specific arbitral forum provided under an arbitration agreement must nevertheless allow for the effective vindication of that claim. Otherwise, arbitration of the claim conflicts with the statute's purpose...."); *Cole v. Burns Int'l Security Serv's*, 105 F.3d 1465, 1482 (D.C. Cir. 1997) (arbitration must offer "all the types of relief that would otherwise be available in court"); *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (Cox, J., concurring for majority of court) ("When an arbitration clause has provisions that defeat the remedial purpose of the statute . . . the arbitration clause is not enforceable."); *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244, 1247-48 (9th Cir. 1994) (invalidating an arbitration agreement that required a claimant to forfeit rights and benefits guaranteed by the Petroleum Marketing Practices Act, including imposing a limit on the recovery of punitive damages and attorneys' fees and a one-year statute of limitations); *Parrett v. City of Connersville, Ind.*, 737 F.2d 690, 697 (7th Cir. 1984) (holding that arbitration offended due process where arbitrator could not award full common law damages nor prevent harm to plaintiff before it occurred); *Martens v. Smith Barney, Inc.*, 181 F.R.D. 243, 256 (S.D.N.Y. 1998) ("arbitration must allow remedies central to the statutory scheme . . . [and] sufficient to satisfy statutory purposes"); *DeGaetano v. Smith Barney, Inc.*, 983 F. Supp. 459, 469 (S.D.N.Y. 1997) ("contractual clauses purporting to mandate arbitration of statutory claims . . . are enforceable only to the extent that the arbitration preserves the substantive protections and remedies afforded by the statute."); *LaChance v. Northeast Publishing, Inc.*, 965 F. Supp. 177, 185 (D. Mass. 1997) (allowing plaintiff to pursue judicial claim under the Americans with Disabilities Act where arbitration agreement did not authorize arbitrator to provide remedy of 'reasonable accommodation' which plaintiff was entitled to pursue under the Act).

arbitration is to be favored and allowed only where it is just another forum for adjudicating a party's statutory rights, not a means of denying those rights.

II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY OF THE OTHER CASES CITED BY CAVALIER.

Having failed to demonstrate any conflict between this Court's decisions and the decision of the Alabama Supreme Court below, Petitioner identifies no other decision that would create a split of authority on the question presented.

In nearly every case cited by Petitioner, the courts were considering challenges to arbitrators' decisions awarding punitive damages to a party – factual circumstances that were entirely unlike those involved here. This is true of *Davis v. Prudential Securities, Inc.*, 59 F.3d 1186 (11th Cir. 1995); *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704 (7th Cir. 1994); *Raytheon Co. v. Automated Business Systems, Inc.*, 882 F.2d 6 (1st Cir. 1989); *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1387 (11th Cir. 1988); and *Willoughby Roofing & Supply Co. v. Kajima Int'l, Inc.*, 598 F. Supp. 353 (N.D. Ala. 1984). Thus, none of these cases involved a challenge to an arbitration clause that prohibited punitive damages, and did not involve a body of state law prohibiting exculpatory clauses relating to punitive damages.

These cases are distinguishable on numerous other grounds as well. For one thing, several of them purport to be applications of federal common law, rather than state law. *See, e.g., Raytheon*, 882 F.2d at 11 n.5; *Baravati*, 28 F.3d at 707. As this Court has subsequently directed, however, generally applicable state law (like the Alabama law at issue here) should govern the issue. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.")

In fact, several of the decisions cited by Cavalier actually support the reasoning of the Court below here. For example, the principal point of the *Raytheon* case – that arbitrators should be permitted to award punitive damages – is entirely consistent with the Alabama Supreme Court's decision here:

> [P]unitive damages can serve as an effective deterrent to malicious or fraudulent conduct. Where such conduct could give rise to punitive damages if proved to a court there is no compelling reason to prohibit a party which proves the same conduct to a panel of arbitrators from recovering the same damages.

Raytheon, 882 F.2d at 12.

In addition to relying upon cases that involve entirely different issues from those raised by this case, Cavalier bases its claims of a conflict in authority on stray passages of dicta from those cases. The quote relied upon by Cavalier from the *Baravati* case, 28 F.3d at 709, for example, is part of a somewhat free-wheeling discussion of the case law flowing from this Court's decision in *Mastrobuono*. The Seventh Circuit explicitly stated that this discussion – including the brief comment relied upon by Cavalier – was merely dicta:

> This disagreement *does not bear directly on the present case, however,* where there is neither a choice of law provision nor a provision in the governing arbitration rules concerning the scope of the arbitrator's remedial powers.

Id. at 709 (emphasis added). This Court need not resolve a conflict between a ruling about Alabama's contract law and a stray statement that "does not bear directly" upon a dispute about federal common law.

In *Davis*, similarly the language relied upon by Cavalier is prefaced by a word that plainly conveys that the quoted phrase is not a holding of the court: "*Presumably*. . .parties wishing to avoid the imposition of punitive damages in arbitration may simply expressly exclude punitive damages in the arbitration agreement." 59 F.3d at 1193. This passage captures the whole distinction between this case and those cited by Cavalier: courts presume that parties can contract to anything, in the absence of substantive state law to the contrary. There is no inconsistency between starting with such a presumption, however, and finding that it gives way to an affirmative body of state substantive law (such as Alabama's) providing that a given state statutory right may not be waived in an exculpatory clause.

Even the few cases cited by Cavalier that do not arise in the setting of the affirmance of an arbitrator's award are readily distinguished from this matter. *Glass v. Kidder Peabody & Co., Inc.*, 114 F.3d 446 (4th Cir. 1997), for example, also does not involve a challenge to an arbitration clause that bars punitive damages, or a substantive state body of law relating to such an exculpatory clause. Instead, the case posed the entirely unrelated question of whether a judge or an arbitrator should consider whether a party is barred from pursuing arbitration by laches if the party excessively delays initiating arbitration after a court orders it to do so. The phrase seized upon by Cavalier appears in a footnote in the portion of the opinion laying out the factual background, and plainly does not constitute a holding of the court. The brief quote is also merely a characterization and summary of *Mastrobuono* which has been shown above not to apply here.

Primeco Personal Communications v. Commonwealth Distributors, Inc., 740 So.2d 585 (Fl. Dist. Ct. App. 1999), similarly, does not involve a challenge to a ban on punitive damages based on state substantive statutory law. The entire portion of the opinion relating to punitive damages amounts to two sentences. A state intermediate appellate decision that fails to discuss the issue raised by the opinion below is not nearly sufficient to justify the exercise of this Court's jurisdiction.

Cavalier's claim that the cases listed above conflict with the opinion below in this case is also belied by other decisions from each of those jurisdictions. Not one of these jurisdictions takes the position that all arbitration clauses are to be enforced as written no matter what. Instead, each jurisdiction recognizes that arbitration clauses may not prevent parties from effectively vindicating substantive statutory rights, and each recognizes that arbitration clauses are not enforceable where they conflict with generally applicable state law.

The *Raytheon* case was decided by the First Circuit, for example, which has also recognized that generally applicable state laws may lead to the invalidation of particular arbitration contracts. *See Securities Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1121 (1st Cir. 1989). The *Glass* case was decided by the Fourth Circuit, which has also recognized that courts should examine whether arbitration contracts run afoul of "such grounds as exist at law or in equity for the revocation of any contract." *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999). The *Bavarati* case was decided by the Seventh Circuit, which has also struck down arbitration clauses that run afoul of "ordinary state law contract principles." *Penn v. Ryan's Family Steak Houses, Inc.*, 269 F.3d 753, 759 (7th Cir. 2001). The *Davis* case was decided by the Eleventh Circuit, which has struck down an arbitration clause that had "provisions that defeat the remedial purposes of the statute. . .." *Paladino v. Avnet Computer Tech., Inc.*, 134 F.3d 1054 (11th Cir. 1998). The *Primeco* case was decided by a Florida District Court of Appeal, and another such court has struck down an arbitration clause that "effectively insulated" a company from "liability under state consumer laws. . . ." *Powertel v. Bexley*, 743 So.2d 570, 577 (Fla. Dist. Ct. App. 1999). Taken in context, then, there is no conflict between the opinion below and the complete body of law on this subject in any of the jurisdictions relied upon by Petitioner. Each of those courts has recognized the principles relied upon by the court below – that arbitration clauses do not permit parties to eliminate other parties' substantive rights to statutory remedies, and courts may refuse to enforce clauses that do

eliminate such rights under generally applicable rules of state contract law.

In short, Petitioner has identified no authority that conflicts with the Alabama Supreme Court's decision or supports the extraordinary contention that preemption under the FAA bars Alabama's generally applicable rule that the statutory right to pursue punitive damages for certain claims cannot be waived by contract.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

F. Paul Bland, Jr.
(Counsel of Record)
Michael J. Quirk
Trial Lawyers for Public Justice, P.C.
1717 Massachusetts Ave., NW,
Suite 800
Washington, D.C. 20036
(202) 797-8600

G. William Gill
James G. Bodin
McPhillips, Shinbaum & Gill, L.L.P.
516 South Perry Street
Montgomery, Alabama 36104
(334) 282-1911

Arthur H. Bryant
Trial Lawyers for Public Justice, P.C.
One Kaiser Plaza, Suite 275
Oakland, CA 94612-3684
(510) 622-8150

Counsel for Respondent

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